

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. C 07-5944 SC
)	
In re: CATHODE RAY TUBE (CRT))	MDL No. 1917
ANTITRUST LITIGATION)	
This Document Relates to:)	ORDER DENYING TOSHIBA'S MOTION
)	TO DISMISS DELL'S FIRST AMENDED
)	<u>COMPLAINT</u>
Dell Inc. v. Hitachi Ltd., No.)	
13-cv-2171)	
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I. INTRODUCTION

Now before the Court is the Toshiba Defendants'¹ Rule 12(b)(6) motion to dismiss Plaintiffs Dell Inc. and Dell Products L.P.'s ("Plaintiffs") first amended complaint. ECF No. 1726 ("FAC"). The motion is fully briefed. ECF Nos. 1998 ("Mot."), 2193 ("Opp'n"), 2230 ("Reply"). The Court finds it appropriate for resolution without oral argument, Civ. L.R. 7-1(b), and DENIES it.

II. BACKGROUND

The parties are familiar with the general facts of this case, which is an antitrust action concerning the alleged price-fixing of

¹ The Toshiba Defendants are Toshiba Corporation, Toshiba America Information Systems, Inc., and Toshiba America Electronic Components, Inc.

1 cathode-ray tubes ("CRTs"). A brief factual summary relevant to
2 the instant motion follows.

3 The Toshiba Defendants are companies that are all alleged to
4 have manufactured, marketed, sold, or distributed CRT Products in
5 the United States, either directly or through subsidiaries or
6 affiliates. FAC ¶¶ 61-64. Plaintiffs allege that the Toshiba
7 Defendants participated in an international conspiracy to fix the
8 prices of CRTs, and that they never effectively withdrew from it.
9 Id. ¶¶ 149-51. Plaintiffs also contend that the Toshiba Defendants
10 and other Defendants were highly interrelated, as when they formed
11 CRT-related joint ventures. See id. ¶¶ 95-96. Plaintiffs state
12 that they bought price-fixed CRT Products "directly from Defendants
13 and co-conspirators, and/or Defendants' and co-conspirators'
14 subsidiaries and affiliates, and/or any agents controlled by
15 Defendants, Defendants' subsidiaries and affiliates, co-
16 conspirators or co-conspirators' affiliates," as well as from
17 original equipment manufacturers ("OEMs") and other suppliers. See
18 id. ¶¶ 20, 61-64. The Toshiba Defendants now move to dismiss.

19
20 **III. LEGAL STANDARD**

21 A motion to dismiss under Federal Rule of Civil Procedure
22 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
23 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
24 on the lack of a cognizable legal theory or the absence of
25 sufficient facts alleged under a cognizable legal theory."
26 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
27 1988). "When there are well-pleaded factual allegations, a court
28 should assume their veracity and then determine whether they

1 plausibly give rise to an entitlement to relief." Ashcroft v.
2 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court
3 must accept as true all of the allegations contained in a complaint
4 is inapplicable to legal conclusions. Threadbare recitals of the
5 elements of a cause of action, supported by mere conclusory
6 statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v.
7 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
8 complaint must be both "sufficiently detailed to give fair notice
9 to the opposing party of the nature of the claim so that the party
10 may effectively defend against it" and "sufficiently plausible"
11 such that "it is not unfair to require the opposing party to be
12 subjected to the expense of discovery." Starr v. Baca, 652 F.3d
13 1202, 1216 (9th Cir. 2011).

14 Claims sounding in fraud are subject to the heightened
15 pleading requirements of Federal Rule of Civil Procedure 9(b),
16 which requires that a plaintiff alleging fraud "must state with
17 particularity the circumstances constituting fraud." See Kearns v.
18 Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy
19 Rule 9(b), a pleading must identify the who, what, when, where, and
20 how of the misconduct charged, as well as what is false or
21 misleading about [the purportedly fraudulent] statement, and why it
22 is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys.,
23 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks
24 and citations omitted).

25 26 **IV. DISCUSSION**

27 The Toshiba Defendants argue that Plaintiffs have failed to
28 allege facts that would support standing under the "ownership or

1 control" exception of Illinois Brick v. Illinois, 431 U.S. 720
2 (1977). That case, now quite familiar to all parties in this MDL,²
3 set forth several exceptions to the general rule that plaintiffs
4 who purchased allegedly price-fixed goods indirectly -- i.e., not
5 from the ultimate price-fixer -- lack standing to bring a federal
6 antitrust case. See In re ATM Fee Antitrust Litig., 686 F.3d 741,
7 749 (9th Cir. 2012). One exception, the "ownership or control"
8 exception, provides for standing when a plaintiff bought the
9 allegedly price-fixed good from an entity owned or controlled by
10 the ultimate price-fixer. Id.

11 Plaintiffs respond that the Toshiba Defendants had previously
12 stipulated not to raise this argument on a motion to dismiss, and
13 in any event that their allegations are enough to support standing
14 at this time.

15 Plaintiffs and the Toshiba Defendants entered the stipulation
16 in question on October 1, 2013, ECF No. 1969 ("Stip."), after the
17 Court issued its August 21, 2013 Order on the Defendants' Joint
18 Motion to Dismiss Certain Direct Action Plaintiffs' ("DAP")
19 Complaints, ECF No. 1856 ("Aug. 21 Order"). The relevant parts of
20 the Stipulation read as follows:

21 The Stipulating Plaintiffs' Complaints do not seek to
22 proceed under the "cost-plus" and "co-conspirator"
exceptions to Illinois Brick;

23 The undersigned Defendants' request to dismiss the
24 Stipulating Plaintiff's Complaints as they pertain to
25 the Stipulating Plaintiffs' right to proceed under the
26 "ownership or control" exception to Illinois Brick is
denied for the reasons set forth in the August 21, 2013
Order; and

27
28 ² See, e.g., ECF No. 1470 ("Order Re: Defs.' Joint Mot. for S.J.")
("S.J. Order.")).

1 By virtue of this Stipulation, the undersigned
2 Defendants and the Stipulating Plaintiffs do not waive
3 any of their appeal rights to the Illinois Brick issues
4 addressed and resolved in this Stipulation.

5 Stip. ¶¶ 5-7.

6 In support of their argument that the Stipulation bars the
7 Toshiba Defendants from raising the ownership or control issue on a
8 motion to dismiss, Plaintiffs also include an email from the
9 Toshiba Defendants' counsel concerning the Stipulation:

10 Certain of the defendants are planning on moving to
11 dismiss the Sharp, Dell, and Tech Data complaints on the
12 basis of Illinois Brick. Recall that Judge Conti
13 previously granted similar motions with respect to the
14 "cost-plus" and "coconspirator" exceptions to Illinois
15 Brick, while denying such motions with respect to the
16 "ownership and control" exception.

17 Rather than briefing this issue, we propose resolving
18 this issue in the attached stipulation. We could add
19 language to the stipulation that closely follows Judge
20 Conti's ruling on the issue. Everyone would preserve
21 their appeal rights. Please let me know what you think.

22 ECF No. 2193-1 ("Bernstein Decl.") Ex. A ("Lau Ltr.").

23 The Toshiba Defendants read the Stipulation and the Lau Letter
24 to permit them to base a motion to dismiss on the inadequacy of
25 Plaintiffs' pleadings. Here they point to the August 21 Order,
26 which granted Defendants' motion to dismiss to the extent that it
27 challenged the DAPs' right to proceed under Illinois Brick's "cost-
28 plus" or "co-conspirator" exceptions, but denied it to the extent
that it challenged the DAPs' rights to proceed under the ownership
or control exception. Aug. 21 Order at 5.

The Court's decision there was based on Defendants' statement
that they raised the issue in their motion to dismiss only to
preserve it for appeal, not to brief and argue it fully. See ECF
Nos. 1664 ("R&R on Joint MTD") at 4-5, 1706 ("Joint Obj'ns to R&R")

1 at 24. Defendants' litigation position was based on their
2 contention that the Court's ruling on ownership or control was
3 wrong as a matter of law, so far as it held that the exception can
4 apply to "the purchase of a finished product from an entity
5 allegedly owned or controlled by an allegedly conspiring
6 Defendant." Joint Obj'ns to R&R at 24. Recognizing that the
7 Court's earlier holding as to the availability of the ownership or
8 control exception constituted the law of the case, Defendants did
9 not attempt to re-litigate it. Id. In a footnote, Defendants
10 clarified further that the issue of proving the exception is a
11 different question, and noted that the adequacy of the DAPs'
12 pleading of the exception were not before the case's former Special
13 Master at the hearing on that motion. Id. at 24 n.21.

14 Accordingly, the Court stated in its August 21 Order that it
15 expressed "no view as to whether the DAPs will be able to prove
16 what is needed to establish the ownership or control exception" and
17 made "no ruling on the adequacy of the DAPs' allegations of
18 ownership and control." Aug. 21 Order at 5. The Toshiba
19 Defendants' position is apparently that since the Court made no
20 ruling as to how a party should plead the ownership or control
21 exception, its holding only extends to the legal issue of whether
22 the exception applies at all in a fact pattern like this one.

23 The Court finds for Plaintiffs. The stipulation and the
24 Court's prior orders all indicate that the ownership or control
25 exception was not to be re-litigated. In any event, the Court
26 finds Plaintiffs' allegations sufficient to entitle them to the
27 ownership or control exception at this time. Plaintiffs pled that
28 they purchased CRT Products from Toshiba, Toshiba's affiliates or

1 agents, or any agents that Toshiba or its subsidiaries controlled,
2 and that it was injured when it paid artificially high prices for
3 those products. This is sufficient to entitle them to the
4 ownership or control exception as a pleading matter. Whether they
5 have the facts to prove it is a different issue. Toshiba's motion
6 is accordingly DENIED on these grounds.

7
8 **V. CONCLUSION**

9 As explained above, the Toshiba Defendants' motion to dismiss
10 Plaintiffs Dell Inc. and Dell Products L.P.'s first amended
11 complaint is DENIED.

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13 IT IS SO ORDERED.

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15 Dated: March 13, 2014



16 UNITED STATES DISTRICT JUDGE
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